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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 620

JIM LAING

Petitioner

v.

COMMONWEALTH OF VIRGINIA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

TO: THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Jim Laing, of Pearisburg, Virginia, respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court to review the final decision and judgment of the Supreme

Court of Appeals of Virginia, rendered on the 31st day of August, 1962, and hereinafter sets forth and represents as follows:

PROCEEDINGS IN COURTS BELOW

The references made herein are to pages of the official record, nine (9) copies of same having been filed herewith, and are designated by "(O.R.)".

On February 28, 1961, petitioner was charged, upon the complaint of the dog warden of Giles County, Virginia, that he did "unlawfully possess one sheep-killing dog" (O.R. 2). On March 6, 1961, the matter came on to be heard upon the warrant of arrest charging said offense before the county court of Giles County, Virginia, the petitioner appearing pursuant to a summons. Thereupon, said court found "the defendant [petitioner] guilty, of possessing a sheep killing dog, and adjudge that he pay the cost of this proceeding, and that the dog be killed as provided by law" (O.R. 2-3). The matter was appealed to the circuit court of Giles County, Virginia.

At the July, 1961, term of the circuit court of Giles County, Virginia, petitioner stood charged with a violation of law, to-wit: "having in possession one sheep-killing dog, in violation of Virginia Code §29-197", and pleaded not guilty to the warrant (O.R. 3).

Counsel for petitioner duly and timely moved the trial court to dismiss the appeal and quash the proceedings upon the ground, inter alia, (O.R. 3):

> "That it is not unlawful 'to possess a sheep-killing dog' and there exists no law in this

> Commonwealth prohibiting said act; that the defendant [petitioner] is charged in the warrant of an act which is neither prohibited nor unlawful and therefore, the warrant is bad".

This motion was overruled by the trial court. After evidence was heard and judgment of the trial court rendered, the petitioner, by counsel, moved the court to set aside its verdict inasmuch as same was contrary to the law and evidence. This motion, likewise, was overruled by the court. The court directed that the dog be killed but made no disposition of the criminal charge (O.R. 4).

On the 8th day of January, 1962, the Supreme Court of Appeals of Virginia awarded a writ of error and *supersedeas* to the judgment rendered by the circuit court of Giles County.

Thereafter, on the 31st day of August, 1962, the Supreme Court of Appeals rendered its written opinion, and by a divided vote, affirmed the judgment of the circuit court. *Laing v. Commonwealth*, 203 Va. 682, 127 SE 2d 142. The opinion of the appellate court is attached hereto, in its entirety, as Appendix 20. Said opinion, in the dissent, states in part:

> "Thus, the statute provides an orderly procedure for the confiscation and destruction of a sheep-killing dog after due notice to its owner. In the present proceeding, without such notice to the owner, the lower court has entered an order depriving him of the ownership of the dog and directing its destruction because the owner happened to be in court on that occasion in defense of a criminal charge against him. In effect, the court, without

notice or process, converted a *criminal* proceeding against the owner of the dog into a *civil* proceeding for its forfeiture. This may be a short cut to the desired result, but, in my opinion, it does violence to the elementary requirement of due process of law."

The petitioner filed his petition for rehearing before the Supreme Court of Appeals of Virginia, upon the constitutional issue raised by the minority and decided by a full court. On the 8th day of October, 1962, the court denied the prayer of said petition (Appendix 28). The dissent raised, for the first time, a constitutional point upon which this petition for writ of certiorari is predicated. The majority, after considering the constitutional point in the dissent, based its decision on a nonfederal question.

Upon the petition to rehear, this Federal question was exhaustively treated by the petitioner. The denial of the petition to rehear necessitated the appellate court to once more pass upon the Federal question (Appendices 27 and 28).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3) (June 25, 1948, c. 646, 62 Stat. 929).

In view of the numerous decisions handed down by this Honorable Court of and pertaining to the proper raising of a Federal question in the state court, petitioner deems it necessary to further amplify his statement of jurisdiction.

Although petitioner, in the original hearing on the writ of error in the Supreme Court of Appeals of

Virginia, and in the briefs and oral arguments thereon, did not raise any Federal question, the Supreme Court of Appeals of Virginia, in its dissenting opinion, raised and decided a Federal question, that is, whether or not the petitioner was denied procedural due process afforded by the Constitution of the United States and the Constitution of the Commonwealth of Virginia. The Supreme Court of Appeals necessarily passed upon the Federal question brought out by the minority and the majority wrote its opinion, which opinion ultimately became the final one.

Further, it is to be remembered that upon the petition to rehear, the Federal question was exhaustively argued in petitioner's brief and again, the Supreme Court of Appeals of Virginia passed upon and determined the Federal question adversely to petitioner.

The Federal question is properly before this Honorable Court. See generally, *Fire Ass'n. of Philadelphia v. People*, 119 US 110, 7 S Ct 108, 30 L ed 342; *Otis v. Oregon*, 116 US 548, 6 S Ct 523, 29 L ed 719; *Gibson v. Chouteau*, 8 Wall. 317, 19 L ed 317; *Rector v. Ashley*, 6 Wall. 142, 18 L ed 733; *Medberry v. Ohio*, 24 How. 413, 16 L ed 739; *Williams v. Norris*, 12 Wheat. 117, 6 L ed 571; *Consolidated Turnpike Co. v. Norfolk & O. V. R. Co.*, 228 US 596, 33 S Ct 605, 57 L ed 982; *Whitney v. California*, 274 US 357, 47 S Ct 641, 71 L ed 1095; *Honeyman v. Hannon*, 300 US 14, 57 S Ct 350, 81 L ed 476; *Dixon v. Duffy*, 344 US 143, 73 S Ct 193, 97 L ed 153.

To dispel any further doubt, if any there be, that this petition is not properly before this Court on the Federal question, petitioner cites *Safe Deposit & T.*

Co. of Norfolk v. Virginia, 151 Va. 883, 141 SE 326, *reversed in* 280 US 83, 50 S Ct 59, 74 L ed 180, 67 A L R 386.

Also, in *Honeyman v. Hannon*, at 300 US pp. 22, 25, 81 L ed pp. 481, 483, supra, this Court said:

> "Thus the true function of a certificate or statement of a state court by way of amendment of, or addition to, the record, is to aid in the understanding of the record, to clarify it by defining the Federal question with reasonable precision and by showing how the question was raised and decided, so that this Court upon the record as thus clarified may be able to see that the Federal question was properly raised and was necessarily determined.
>
> * * *
>
> "In the exercise of our appellate jurisdiction we have power not only to correct errors in the judgment under review but to make such disposition of the case as justice requires. We have applied this principle to cases coming from state courts where supervening changes had occurred since the entry of the judgment, and where the record failed adequately to state the facts underlying the decision of the Federal question. (Citing cases). We have afforded an opportunity for appropriate presentation of the question by an amendment of the record as the state court might be advised. Villa v. Van Schaick, supra. We think that a similar opportunity should be accorded here in order that uncertainty may be removed and that the precise nature of the Federal question, how it was raised and the grounds of its disposition, may be definitely

whether a substantial question within our set forth, so that we may be able to decide jurisdiction has necessarily been determined.

"For that purpose the judgment is vacated and the cause is remanded for further proceedings."

QUESTIONS PRESENTED

Jim Laing assails the judgment of the circuit court of Giles County, Virginia, and he here and now contends that he was denied due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States, which contention raises the following questions:

I. Was the petitioner denied procedural due process of law by virtue of the manner and means used to deprive him of his property?

II. Is the Code of Virginia, §29-197, constitutionally repugnant?

THE CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The pertinent part of the Fourteenth Amendment to the Constitution of the United States, reads as follows:

"§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to*

any person within its jurisdiction the equal protection of the laws." (Italics supplied.)

The Code of Virginia, §29-197, 1950, as amended, provides in full, as follows:

"*Dogs killing or injuring sheep or other livestock or poultry.* — It shall be the duty of any warden who may find a dog in the act of killing, injuring, worrying or chasing sheep, or killing or injuring other livestock, to kill such dog forthwith whether such dog bears a tag or not, and any person finding a dog committing any of the depredations mentioned in this section, shall have the right to kill such dog on sight. The governing body of any county, or any trial justice or other court, shall have the power to order the game warden or other officer to kill any dog known to be a confirmed poultry killer, and any dog killing fowls for the third time shall be considered a confirmed poultry killer. Any warden or other person who has reason to believe that any dog is killing livestock, or committing any of the depredations mentioned in this section, shall apply to a justice of the peace of the county, city or town wherein such dog may be, who shall issue a warrant requiring the owner or custodian, if known, to appear before the trial justice at a time and place named therein, at which time evidence shall be heard, and if it shall appear that such a dog is a livestock killer, or has committed any of the depredations mentioned in this section, the dog shall be ordered killed immediately, which the warden, or other officer designated by the trial justice to act, shall do. This section as hereby amended shall not apply to any pro-

ceeding, civil or criminal, pending in any court in this State on June 29, 1956."

STATEMENT OF FACTS

On Tuesday, February 28, 1961, shortly after 11:00 o'clock, a. m., Sam Thompson, a resident of Pearisburg, Virginia, found two German shepherd dogs on one of his sheep out in his field. One of the dogs belonged to the petitioner. Mr. Thompson called the sheriff's office in Pearisburg. Upon Deputy Whittaker's arrival at the scene, Thompson shot petitioner's dog in the face and chest as the dog was leaving his companion and the sheep. The dog ran away after being shot.

Thompson and Whittaker went to the petitioner's house and advised him of what had taken place. No wool had been found in the dog's mouth immediately after the incident. The evidence adduced ~~revealed~~ that generally, this type of dog is of high intellect. Specifically, the petitioner's dog is unusually obedient, well trained and intelligent.

On the same day, petitioner was charged with the unlawful possession of a sheep-killing dog, and thereafter, his dog was judicially confiscated by a proceeding originally instituted upon the charge of the crime. The judgment order of the circuit court of Giles County did not acquit nor discharge the petitioner from the charge therein contained. The judgment order is mute as to this point. In order not to be redundant, petitioner, in amplification, refer the Court to the statements previously set out and contained in the heading "Proceedings In Courts Below."

ARGUMENT

I. PETITIONER WAS DENIED PROCEDURAL DUE PROCESS OF LAW

(a) *A Dog Constitutes Personal Property*

Dogs are given the status of property in Virginia. By virtue of the Code of Virginia, §29-193, 1950, as amended, it is provided that, "'all dogs in this State which are licensed, and all dogs under four months of age, whether licensed or not, shall be deemed *personal property*'". (Italics supplied.)

The Fourteenth Amendment to the Constitution of the United States, supra, states: "'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or *property*, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'" (Italics supplied.)

In *Fucelli v. American Soc. etc.*, 23 NYS 2d 983, 984, the court stated: "She [plaintiff] has an indisputable property right in 'Brownie' [a dog] of which she may not be deprived without due process of law".

(b) *The Due Process Clause*

District Judge Igoe said in *U. S. v. Ragen*, 86 F Supp 382, 388:

> "Due process, in short, means fair play. Due process of law is that process of impartial law which is binding because it is right. It senses the mistakes of the past and wants to rectify them. It provides men with faith.

> "Due Process also identifies itself with due course of justice and that phrase *means not only the due conviction and punishment, or the due acquittal and discharge, of an accused person as justice may require, but the due course of proceedings in administration of justice.* . . ." (Italics supplied.)

Due regard must be had to the nature of the proceeding and the character of rights as may have been affected thereby. *U. S. v. Ragen*, supra. The denial of due process has been defined as, "the failure to observe that fundamental fairness essential to the very concept of justice": *Lisenba v. California*, 314 US 219, 236, 62 S Ct 280, 290, 86 L ed 166. Due process also means one which, following the forms of law is appropriate to the case and just to the parties to be affected. *Hagar v. Reclamation Dist.*, 111 US 701, 4 S Ct 663, 28 L ed 569, 572.

In *People v. Adirondack Railway Co.*, 160 NY 225, 54 NE 689, 693, *affirmed*, 176 US 335, 20 S Ct 460, 44 L ed 492, it was said that due process means procedure having "the sanction of settled usage." Therein, it was further said that due process of law necessarily varies with the facts of the case and depends upon the necessity for safeguards against the exercise of arbitrary power. Lastly, in said case, it was stated that procedural due process is a "method of procedure based upon long established usage", and consists in the observance of those safeguards which time and experience have shown are necessary to protect the citizens in their enjoyment of life, liberty, and property.

Ex parte Estrada, 93 F Supp 713, 715, has this to say: "'Due process' is a big phrase. It applies not only

to civil and property rights, but, likewise to criminal trials. It means, I think, that the method shall be consistent with fundamental principles of liberty and justice—frequently called 'the law of the land'."

In *Mullane v. Central Hanover B. & T. Co.*, 339 US 306, 313, 70 S Ct 652, 94 L ed 865, 872, 873, the Court stated: "Many controversies have raged about the cryptic and abstract words of the 'Due Process' clause but there can be no doubt that at a minimum they require that deprivation of property by adjudication be preceded by notice appropriate to the nature of the case."

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice calculated under all the circumstances, to apprise the party of the nature of the proceeding. See generally, *Milliken v. Meyer*, 311 US 457, 61 S Ct 339, 85 L ed 278, 132 A L R 1357; *Mooney v. Holohan*, 294 US 103, 55 S Ct 340, 79 L ed 791, 98 A L R 406; *Grannis v. Ordean*, 234 US 385, 34 S Ct 779, 58 L ed 1363; *Priest v. Las Vegas*, 232 US 604, 34 S Ct 443, 58 L ed 751; *Goodrich v. Ferris*, 214 US 71, 29 S Ct 580, 53 L ed 914; *Roller v. Holly*, 176 US 398, 20 S Ct 410, 44 L ed 520.

Due process does require, "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'the law of the land'." *Herbert v. Louisiana*, 272 US 312, 316, 47 S Ct 103, 71 L ed 270, 273.

Mr. Chief Justice Warren said, in *Hannah v. Larche*, 363 US 420, 441, 80 S Ct 1502, 4 L ed 2d 1307, 1321: "** due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings**." See *Payne v. Arkansas*, 356 US 560, 78 S Ct 844, 2 L ed 2d 975; and *Bartkus v. Illinois*, 359 US 121, 79 S Ct 676, 3 L ed 2d 684.

(c) *The Application Of The Due Process Clause To The Instant Case*

The petitioner respectfully submits that there exists a real, substantial, bona fide and meritorious question in this petition involving the Constitution, its application and effect of the due process clause.

Petitioner challenges opposing counsel to cite any criminal proceeding resulting in property forfeiture by the means, method and procedure adopted in the instant case, which proceeding was held to be valid and constitutional. As the Supreme Court of Appeals of Virginia stated in the dissenting opinion (Appendix 25), "** the court, without notice or process, converted a *criminal* proceeding against the owner of the dog into a *civil* proceeding for its forfeiture. ***(I)t does violence to the elementary requirement of due process of law."

The majority opinion (Appendix 24) stated that the petitioner does not claim, "that the judgment was without due process of law, nor that he just 'happened to be in court', as suggested in the dissenting opinion"; and that Laing was in the circuit court of Giles County prosecuting his appeal from the judgment of the trial justice that his dog be killed.

We cannot be oblivious to the fact that petitioner 'just happened to be in court' pursuant to a *warrant of arrest* directed to the sheriff of Giles County to apprehend the said Jim Laing and bring him or cause him to be brought before the judge of the circuit court of said county to answer the complaint and to be dealt with according to law in that the petitioner did unlawfully possess one sheep-killing dog. This warrant carried more than overtones of a criminal offense. It *charged* a criminal offense. This was not just "notice" but was an affirmative declaration on the part of the state that the petitioner did violate a criminal law, was to be brought before the court and therefore, was to be dealt with accordingly. Petitioner came into court in defense of this *criminal* charge. Further, petitioner knew that the "charge" carried criminal implications by virtue of the provision of the Code of Virginia, §29-213, 1950, as amended, wherein it is recited that, "any violations other than those enumerated therein for which a specific penalty is not provided, shall be a misdemeanor." Petitioner, by his appearance in court, manifested his respect for the law, not his indifference. He should be honored, not punished for his obedience to the solemn order contained in the warrant of arrest. Laing appeared in court mentally conditioned and legally summoned for the defense of a *criminal* charge. He was in court for that reason and for that reason alone. What was the outcome of this criminal prosecution? The petitioner was divested of his property right in his dog.

The method used by the circuit court of Giles County in confiscating the dog was not a method of procedure based upon long established usage. The

method of procedure failed to observe those safeguards which time and experience have shown are necessary to protect the citizenry in the enjoyment of life, liberty, and property; failed to pursue the ordinary mode prescribed by law; failed to observe those general rules established in our system of jurisprudence for the security of private rights; failed to adopt a procedure sanctioned by settled usage; and failed to consider the nature of the action, character of relief demanded and the circumstances involved. The method of procedure allowed petitioner an opportunity to be heard but gave no notice or information with respect to the subject matter of the confiscation and destruction of his dog.

This Honorable Court must see a clear connection between the assumed purpose of the law and the actual proceedings had therein to effect that purpose. This Court is saddled with the obligation, responsibility and duty to enforce, in protection of petitioner's private rights, the inexorable safeguard of due process.

Petitioner was and still is constitutionally entitled to notification which is precatory in nature. For example, a *notice to appear and show cause before the* circuit court of Giles County, if he be so advised, why he should not be deprived of his dog—his property—and not "notice" which takes the form of a criminal arrest demanding and requiring his presence in court to defend against the alleged commission of a crime. Petitioner came before the circuit court of Giles County in defense of a criminal proceeding, not for the purpose of defending the confiscation and destruction of his personal property. If such a proceeding is not constitutionally guarded, then, *any* notice that the state selected would be sufficient under *any* circumstances

and under any proceeding. Precedence has dictated that the form and nature of the proceeding must be considered and that those general rules established in our system of jurisprudence for the security of private rights must be observed.

In its majority opinion (Appendix 24), the Virginia appellate court said: "* * If the circuit court had issued a proper warrant, as it could and should have done, it would in this case only have served the same function and been given the same effect as was given to the original warrant. *The defendant [petitioner] has not been harmed or in any way prejudiced* by the failure of the court to quash the original warrant and issue a properly worded warrant. The defendant [petitioner] *has not been convicted of any crime.*" (Italics supplied.) Petitioner takes issue with this statement for it is fundamentally wrong. Due process means not only due course of proceedings in the administration of justice *but the due acquittal and discharge of an accused person. U. S. v. Ragen*, supra. Indeed, petitioner was "an accused person." Laing asserts that he has not been duly acquitted and discharged of the charge contained in the warrant of arrest. There was no disposition whatsoever made of the criminal charge by the circuit court of Giles County. It cannot be said that a negative acquittal and discharge is sufficient for it is constitutionally demanded that the state positively and affirmatively do this act.

How one can fail to see the obvious in the official record filed herein is beyond petitioner's comprehension.

II. Code of Virginia §29-197 is Constitutionally Repugnant and Therefore Void

Petitioner asserts that that portion of §29-197, Code of Virginia, which provides for summary destruction of sheep-killing dogs is valid. As to that portion which provides for the issuance of a warrant requiring the owner or custodian of the dog, if known, to appear before the trial justice at a time and place named therein, in the form and manner as was done in the instant case, petitioner maintains is invalid and constitutionally repugnant.

Although Laing insists that the law enforcement authorities of Giles County, Virginia, should have served him with precatory notice—a notice which would afford him the opportunity to appear rather than compel him to appear—still, if it be said that said authorities but followed the requirement of the statute, then the provision of said statute is violative of the Federal Constitution.

It behooves the legislature to provide a procedure which would not have its inception by "notice" destined to flagrantly mislead the owner of a dog caught committing the depredations enumerated in said statute. As the attorney general stated in his brief, at page 5, "Perhaps this statute [§29-197] leaves something to be desired, since the provision for the issuance of a 'warrant' appears rather harsh, and carries some overtones of a criminal offense as one might normally utilize the word."

The statute leaves something to be desired, *a fortiori*, when it provides for the initiation of the proceeding upon the issuance of the type of "notice" as

stated therein. It is abundantly clear that the statute leaves no discretion in the owner as to whether or not he will appear. It compels him to appear and further, in the instant case, the confiscation of the dog was camouflaged by the warrant of arrest charging a criminal offense. This procedure lacks any and all semblance of fair play embodied in the due process requirement and is manifestly unjust.

CONCLUSION

Candidly, petitioner announces that the statement in the majority opinion that he did not claim the judgment of the circuit court of Giles County was without due process of law is true. Nevertheless, the constitutional point having been raised, considered and decided by the Supreme Court of Appeals of Virginia manifestly gives this Honorable Court jurisdiction to protect petitioner from a deprivation of his constitutional rights and guaranties of due process of law.

PRAYER

Accordingly, petitioner respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court directed to the Supreme Court of Appeals of Virginia.

Respectfully submitted:

ALEX N. APOSTOLOU
Shenandoah Building
Roanoke, Virginia

HARVEY S. LUTINS, OF
HONEYMAN & LUTINS
324 Washington Avenue, S. W.
Roanoke, Virginia
Attorneys for Petitioner

Dated: November 21, 1962

PROOF OF SERVICE

I, Alex N. Apostolou, an attorney of record for Jim Laing, petitioner herein, depose and say that on the 26th day of November, 1962, I served a copy of the foregoing petition, by mailing the same, with first class postage prepaid, to the following counsel of record:

ROBERT Y. BUTTON
Supreme Court Building
Richmond, Virginia
Attorney General of Virginia

Alex N. Apostolou

Subscribed and sworn to before me at Roanoke, Virginia, this 26th day of November, 1962.

Notary Public

My commission expires:

5-2-64

Present: All the Justices

JIM LAING

v.

COMMONWEALTH OF VIRGINIA

RECORD NO. 5447

OPINION BY JUSTICE ARCHIBALD C. BUCHANAN
Staunton, Virginia, August 31, 1962

FROM THE CIRCUIT COURT OF GILES COUNTY
VINCENT L. SEXTON, JR., *Judge*

The appellant, Jim Laing, herein referred to as defendant, appeals from a judgment entered by the circuit court finding that the shepherd, or police, dog owned by the defendant was a livestock killer, "having been found in the act of killing, injuring and worrying sheep," and ordering that the dog be killed immediately by an officer designated for that purpose.

The proceeding had its origin in a warrant issued by the clerk of the county court of Giles County on the complaint of the dog warden that the defendant, on February 28, 1961, did "unlawfully possess one sheep killing dog." While the warrant directed that the defendant be apprehended and brought before the court, he was not in fact arrested but was given a written notice to appear on March 6, 1961, to answer the charge.

of which notice he signed an acceptance of service. He appeared on that day with his counsel and the county judge found him guilty "of possessing a sheep killing dog," and ordered that the dog be killed and that the defendant pay the cost of the proceeding. He appealed to the circuit court, where he later appeared and requested a continuance to the next term, which was granted.

On his trial at the next term the defendant made a motion that the court dismiss the appeal and quash the proceeding on the grounds that the order of the county court was null and void, and that it was not unlawful to possess a sheep killing dog and hence the defendant was charged with an act which is neither prohibited nor unlawful. The court overruled the motion, trial by jury was waived, the court heard the evidence and made the finding and entered the judgment above stated.

The defendant does not now complain about the finding and judgment of the trial court. He expressly abandons his assignments of error which allege that the evidence was not sufficient to support the judgment and that the judgment of the county court was a nullity. He rests his appeal, he says, "solely upon the trial court's failure and refusal to dismiss the defective warrant or to amend same upon the ground that he was charged with an act neither prohibited nor unlawful."

The charge against the defendant was based on § 29-197 of the Code, as amended, which makes it the duty of the dog warden, and gives the right to any person, to kill forthwith a dog found by him in the act of killing, injuring, worrying or chasing sheep, or killing or

injuring other livestock. The owner of the sheep in this case, together with a deputy sheriff, saw defendant's dog in the act of killing the sheep. The owner shot at and wounded the dog, which ran away and returned to the defendant's home. The owner and the officer went to the defendant's home and told him what had occurred. The warrant was issued later that day.

Section 29-197 also provides that a warden or other person who has reason to believe that a dog is committing any of the depredations mentioned in the statute shall apply to a justice of the peace who shall issue a warrant requiring the owner or custodian to appear before the trial justice, county court, who shall hear evidence and if it be shown that the dog is guilty it shall be ordered killed immediately by the warden or other designated officer. See *Willcox v. Commonwealth*, 181 Va. 770, 27 S. E. 2d 214, for a discussion of the statute in a different context.

It is apparent that § 29-197 does not, nor does any other section of the Code, make it unlawful to possess a sheep killing dog. The defendant was not guilty of any crime in so doing, the warrant was improperly drawn, and the act which it charged against the defendant was no criminal offense. The defendant's motion to dismiss it should have been sustained, but the failure of the trial court to do so under the circumstances of this case was harmless error.

The defendant was not in fact charged with any crime and he has not been convicted of any crime. While the county judge found him guilty of possessing a sheep killing dog, he did not thereby find him guilty of any criminal offense, and the requirement that he

pay the cost did not convert the charge into a criminal offense. In any event, the effect of the appeal to the circuit court was to deprive the county court of further jurisdiction and annul its judgment of conviction. *Mafout* v. *City of Roanoke*, 177 Va. 846, 855, 13 S. E. 2d 319, 322. The hearing before the circuit court was *de novo*. Code § 16.1-136. That court had full power, on its own motion, to "amend the form of the warrant in any respect in which it appears to be defective," or to issue a new warrant. Code § 16.1-137; *Osa* v. *Town of Appalachia*, 137 Va. 795, 119 S. E. 51.

The warrant prescribed by § 29-197 is a warrant requiring the owner or custodian of the dog to appear at the hearing of evidence as to whether the dog was guilty of the depredations mentioned in that section. Its purpose is to give notice to the owner or custodian of the time and place of the proceeding against the dog and an opportunity to be heard in its defense. *Cf.* § 16.1-129. The warrant in this case was given that effect in the circuit court. The defendant did appear. He heard the evidence against his dog and introduced evidence and testified himself in its defense. If the circuit court had issued a proper warrant, as it could and should have done, it would in this case only have served the same function and been given the same effect as was given to the original warrant. The defendant has not been harmed or in any way prejudiced by the failure of the court to quash the original warrant and issue a properly worded warrant. The defendant has not been convicted of any crime. No verdict of any sort, not even a judgment for costs, has been rendered against him. The only judgment in the case is against the dog and the defendant does not question here the

sufficiency of the evidence to establish the guilt of the dog. Neither does he claim that the judgment was without due process of law nor that he just "happened to be in court," as suggested in the dissenting opinion, when the judgment was rendered. He was in court prosecuting his appeal from the judgment of the trial justice that his dog be killed, and on that issue he was fully heard and does not now claim otherwise.

There is no ground for reversing the judgment against the dog and that is the only judgment given in the order from which the defendant has appealed. It is accordingly *Affirmed*.

Eggleston, C. J., Spratley and Whittle, J. J., dissenting.

Eggleston, C. J., dissenting.

This case originated with a criminal warrant charging that the defendant, Laing, did on the named date "unlawfully possess one sheep killing dog." Convicted in the county court, Laing appealed to the circuit court where he moved to quash the proceeding on the ground, among others, that "the warrant is bad" in that it charged him with the commission of an act "which is neither prohibited nor unlawful." The circuit court overruled the motion to quash, heard the evidence, and without disposing of the criminal charge against the defendant, entered an order finding that the dog was a "livestock killer" and directing that it be "killed immediately."

The majority opinion, after finding that the criminal warrant against Laing was void and should have been dismissed, nevertheless holds that the order di-

recting the destruction of the dog is valid, because, the opinion says, the defendant owner was given a hearing as required by Code, § 29-197, as amended, providing for the confiscation of such an animal. I do not agree.

The pertinent portion of this statute reads as follows: "Any warden or other person who has reason to believe that any dog is killing livestock, or committing any of the depredations mentioned in this section, shall apply to a justice of the peace of the county, city or town wherein such dog may be, who shall issue a warrant requiring the owner or custodian, if known, to appear before the trial justice at a time and place named therein, at which time evidence shall be heard, and if it shall appear that such a dog is a livestock killer, or has committed any of the depredations mentioned in this section, the dog shall be ordered killed immediately, * * *."

Thus, the statute provides an orderly procedure for the confiscation and destruction of a sheep-killing dog after due notice to its owner. In the present proceeding, without such notice to the owner, the lower court has entered an order depriving him of the ownership of the dog and directing its destruction because the owner happened to be in court on that occasion in defense of a criminal charge against him. In effect, the court, without notice or process, converted a *criminal* proceeding against the owner of the dog into a *civil* proceeding for its forfeiture. This may be a short cut to the desired result, but, in my opinion, it does violence to the elementary requirement of due process of law.

It will not do to say that the same result would have followed had the provisions of the statute been complied with. We frequently reverse cases where the requirements of due process have not been met, although we know full well that an orderly proceeding will produce the same result. In *French* v. *Probst*, 203 Va. 704, 127 S. E. 2d 137, this day decided, we are reversing a decree because of improper procedure although such improper procedure produced the same result as can be accomplished by approved procedure.

Traditionally, a sheep-killing dog is the most despicable of all animals. But if the requirements of due process may be disregarded in the case of the dog's owner, why should it be respected in other instances?

In this case, when the lower court found, as it evidently did, that the criminal warrant was void, it should have sustained the defendant's motion to dismiss that proceeding. If it then appeared to the court that probably the dog should be confiscated and destroyed, it should have directed the institution of a proceeding for that purpose in the manner required by the statute.

Justices Spratley and Whittle join in this dissent.

VIRGINIA:

In the Supreme Court of Appeals held at the Masonic Building in the City of Staunton on Friday the 31st day of August, 1962.

Jim Laing, Plaintiff in error

against Record No. 5447

Commonwealth of Virginia, Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of Giles County on the 28th day of July, 1961.

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said circuit court.

Defendant in error's costs:

Attorney's fee	$50.00	A Copy,
Printing brief	40.00	Teste:
Total	$90.00	/s/ H. G. Turner, Clerk

/s/ H. G. Turner, Clerk

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 8th day of October, 1962.

Jim Laing, Plaintiff in error,

against

Commonwealth of Virginia, Defendant in error.

Upon a Petition to Rehear

On mature consideration of the petition of the plaintiff in error to set aside the judgment entered herein on the 31st day of August, 1962, and grant a rehearing thereof, the prayer of the said petition is denied.

A copy, Teste:

/s/ H. G. Turner, Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 620

JIM LAING
Petitioner

v.

COMMONWEALTH OF VIRGINIA
Respondent

PETITION TO REHEAR ORDER OF COURT DENYING WRIT OF CERTIORARI

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ROANOKE PRINTING CO., INC., ROANOKE, VA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 620

JIM LAING,

Petitioner

v.

COMMONWEALTH OF VIRGINIA

Respondent

PETITION TO REHEAR ORDER OF COURT DENYING WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Jim Laing, prays for a rehearing of the order of this Honorable Court on the petition for a writ of certiorari to the Supreme Court of Appeals of Virginia (Appendix).

The following ground, although available to the petitioner, was not previously fully presented.

On the 28th day of July, 1961, the circuit court for the county of Giles, Virginia, entered a judgment which did not dispose of the criminal charge placed against petitioner. For convenience of the Court we set out, *verbatim*, said order:

> "This day came the attorney for the Commonwealth, the attorney for the defendant, and the defendant, who stands charged with a violation of law, to-wit: having in possession one sheep-killing dog, in violation of Virginia Code § 29-197, appeared in pursuance his recognizance, and plead not guilty to the warrant in this case.
>
> Whereupon, counsel for the defendant moved the Court to dismiss the appeal and quash the proceedings upon the following grounds:
>
> (1) That the Judge of the County Court failed to designate an officer to kill the alleged sheep-killing dog, as directed and provided for in said Virginia Code § 29-197, as follows: " . . . and if it shall appear that such a dog is a livestock killer, or has committed any of the depredations mentioned in this section, the dog shall be ordered killed immediately, which the warden, or other officer designated by the trial justice to act, shall do. . . . "; that the order of the County Court is null and void for the reason that no valid judgment was rendered by said County Court upon which an appeal could be perfected.
>
> (2) That it is not unlawful to possess a sheep-killing dog and there exists no law in this Commonwealth prohibiting said act; that the defendant is charged in the warrant of an act which is neither prohibited nor unlawful, and therefore, the warrant is bad.

And the Court, having considered defendant's motion, overruled said motion, to which action said defendant, by counsel, duly excepted.

Thereupon, the attorney for the Commonwealth and defendant, by counsel, waived a trial by jury, pursuant to Virginia Code § 19.2-193, and elected and requested that all matters of law and fact be submitted to the Court for hearing and determination without the intervention of a jury.

Whereupon, after hearing the evidence of the Commonwealth and the defendant, the Court doth find and determine that the German Shepherd or Police Dog owned by the said Jim Laing is a livestock killer, having been found in the act of killing, injuring and worrying sheep; and it is ORDERED that the said dog be killed immediately, and, the Dog Warden of Giles County now being ill, the Court doth designate John E. Hopkins, Sheriff of Giles County, to act in the killing *and* said dog.

Thereupon, the defendant, by counsel, moved to set aside the verdict of the Court on the grounds that the same is contrary to the law and evidence for the reasons hereinbefore assigned, which motion the Court overruled, and the defendant, by counsel, duly excepted.

It is therefore considered by the Court that the said dog be killed immediately by the Sheriff of Giles County, Virginia.

Thereupon, the defendant, by counsel, signifying his intention to apply to the Supreme

Court of Appeals of Virginia for a writ of error from the judgment of this Court; execution of the above judgment is stayed for a period of seventy (70) days from the date of said judgment to enable the defendant to prepare and file his notice of appeal and assignments of error."

There has been no disposition of the criminal charge made against petitioner. As a matter of record, he was and still is charged with an act which is neither prohibited nor unlawful, and it is herein respectfully and emphatically maintained that there remains upon petitioner the stigma of a criminal charge upon which there has been no due acquittal and discharge of him by respondent as required under and by virtue of the due process clause contained in the Fourteenth Amendment to the Constitution of the United States.

Petitioner respectfully submits that this Honorable Court may have inadvertently overlooked the solemn judgment order of the circuit court of Giles County, Virginia, entered on July 28, 1961, and herein humbly prays that this matter be reheard upon the grounds hereinabove set out.

Respectfully submitted,

ALEX N. APOSTOLOU
Shenandoah Building,
Roanoke, Virginia

HARVEY S. LUTINS, of
HONEYMAN & LUTINS,
524 Washington Avenue, S.W.
Roanoke, Virginia

Attorneys for Petitioner

CERTIFICATION AND PROOF OF SERVICE

I, Alex N. Apostolou, an attorney of record for Jim Laing, petitioner herein, do hereby certify that this petition to rehear is presented in good faith and not for delay; that the petition herein is restricted to the ground heretofore specified and that on the 5th day of February, 1963, I served a copy of the foregoing petition by mailing the same, with first class postage prepaid, to the following counsel of record:

ROBERT Y. BUTTON,
Attorney General
State Library Building
Richmond 19, Virginia

FRANCIS C. LEE,
Assistant Attorney General
State Library Building
Richmond 19, Virginia

Alex N. Apostolou

Subscribed and sworn to before me at Roanoke, Virginia, this 5th day of February, 1963.

Notary Public

My commission expires:

My Commission Expires
May 2, 1964

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1962

No. 620

JIM LAING,
Petitioner

v.

VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Appeals of the Commonwealth of Virginia.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Supreme Court of Appeals of the Commonwealth of Virginia,

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

January 14, 1963.

A true copy

Test: JOHN F. DAVIS
Clerk of the Supreme Court of the
United States

By: E. P. Gullman
Chief Deputy